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No. 90-436 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROOSEVELT DANIELS, EDWARD FITZGERALD, LAWRENCE LEE, AND SANDRA CAMPBELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the term of a special grand jury convened under 18 U.S.C. 3331 was extended where the district court stated in a nunc pro tunc order that, before the grand jury's term expired, the court had determined that the grand jury had not completed its investigation.

2. Whether the district court correctly denied petitioners' pretrial motion to suppress telephone calls intercepted over prison telephones.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 902 F.2d 1238. The opinion of the court of appeals dismissing petitioners' interlocutory appeal (Pet. App. 45-48) is reported at 848 F.2d 758; the orders of the court of appeals denying petitions for mandamus (Pet. App. 22-23, 44) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1990. A petition for rehearing was denied on June 11, 1990. Pet. App. 14. The petition for a writ of certiorari was filed on September 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the Northern District of Illinois, petitioners were each convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, and—with the exception of petitioner Fitzgerald—other narcotics offenses.[1] Petitioner Daniels was sentenced to a total term of 40 years' imprisonment, to be followed by a life term of special parole; petitioner Fitzgerald was sentenced to a total term of 20 years' imprisonment, to be followed by a ten-year term of supervised release; petitioner Lee was sentenced to a total term of 15 years' imprisonment, to be followed by a ten-year term of special parole; and petitioner Campbell was sentenced to a total term of 12 years' imprisonment, to be followed by a term of five years' probation. The court of appeals affirmed.

1. From July 1984 to September 1985, petitioners, led by Daniels, operated a large-scale cocaine distribution ring in Chicago. After his arrest and detention on narcotics charges in April 1985, Daniels continued to direct the enterprise from his cell at Chicago's Metropolitan Correctional Center (MCC).

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[1] Petitioner Daniels was convicted on one count of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848, seven counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1), and 14 counts of using a telephone to facilitate a narcotics transaction, in violation of 21 U.S.C. 843(b). Petitioner Lee was convicted on one count of distributing cocaine and three counts of using a telephone to facilitate a narcotics transaction. Petitioner Campbell was convicted on two counts of using a telephone to facilitate a narcotics transaction.

Daniels used the prison's telephone to communicate with his employees, including petitioners Fitzgerald and Campbell. In July 1985, under the Bureau of Prisons' policy to conduct random monitoring of inmates' calls, MCC officials started monitoring Daniels' calls. After discovering that Daniels was running his cocaine trafficking business from prison, MCC officials provided tape recordings of Daniels' calls to the Federal Bureau of Investigation. FBI agents, in turn, obtained judicial authorization to continue monitoring Daniels' calls. Gov't C.A. Br. 6-8, 10, 37-39.

Petitioners filed a pretrial motion to suppress the tape recordings of conversations intercepted over the MCC telephones. The district court denied the motion, concluding that Daniels had consented to the monitoring of his telephone calls. Gov't C.A. Br. 37-38.

2. Petitioners pleaded guilty to charges contained in a second superseding indictment returned by the Special October 1984 Grand Jury sitting in the Northern District of Illinois. The grand jury had been convened under 18 U.S.C. 1331 in October 1984.[2]

a. In March 1986, before the expiration of its initial 18-month term, the grand jury voted to continue its work.[3] No formal written order extending the

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[2] The events and legal issues surrounding the convening and extending of the Special October 1984 Grand Jury have previously been raised before this Court. See *Rosenstein* v. *United States*, cert. denied, 487 U.S. 1236 (1988). We are providing counsel for petitioner a copy of our brief in opposition in *Rosenstein*.

[3] In July and October 1985—before the extension of its term—the grand jury had returned an initial and first superseding indictment against petitioners. See Gov't C.A. Br. 2.

grand jury's term was entered, although the grand jury continued to appear weekly before Chief Judge McGarr (and later Chief Judge Grady) for ten months after the expiration of the 18-month term. The grand jury returned the second superseding indictment against petitioners in August 1986. Gov't C.A. Br. 9-11; see also Pet. App. 67-74.

Following the discovery that there was no written order extending the Special October 1984 Grand Jury, the United States Attorney's Office presented a corrective nunc pro tunc order to Judge McGarr. On March 3, 1987, Judge McGarr entered a nunc pro tunc order stating that he had determined in March 1986 that the grand jury had not completed its work. Pet. App. 51-54.

b. In the meantime, petitioners—having pleaded guilty in September 1986—filed in the district court on February 27, 1987, an emergency motion for a writ of habeas corpus. Petitioners contended that the Special October 1984 Grand Jury was without authority to indict when it returned the second superseding indictment, because the grand jury's term had not been properly extended. Petitioners therefore sought dismissal of that indictment. The district court denied that motion. Pet. App. 15-21. Petitioners then sought a writ of mandamus in the court of appeals. On March 5, 1987, the court of appeals denied the petition as "premature," since "[t]he district court has not yet had an opportunity to evaluate all of the evidence with regard to petitioners' claim." *Id.* at 22-23.

On March 23, petitioners returned to the district court and filed a motion to withdraw their guilty pleas and dismiss the indictment, renewing their contention that the grand jury's term had not been properly extended. Pet. App. 24-40.

c. While petitioners' motion was under advisement, the Seventh Circuit issued its decision in *United States* v. *Taylor*, 841 F.2d 1300, cert. denied, 487 U.S. 1236 (1988), upholding other indictments returned by the Special October 1984 Grand Jury after its initial 18-month term had expired. The court concluded that 18 U.S.C. 3331(a)[4] extends the grand jury's term whenever the district court makes a determination before the expiration of the grand jury's term that the grand jury has not completed its business. Thus, the statute "requires only this judicial determination—not the ministerial act of memorializing it by a formal order—to effect the valid extension of a special grand jury." 841 F.2d at 1306.

The court of appeals acknowledged that, although it would have been preferable for the district court to enter an order at the time of the extension, the absence of a contemporaneous written order was not fatal if there was other "reliable and unequivocal" evidence establishing that the district court actually made the determination that the special grand jury had not finished its business. 841 F.2d at 1308. Based on Judge McGarr's order of March 3, 1987 (Pet. App. 51-54), the court of appeals found the

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[4] Section 3331(a) provides in pertinent part:

> The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in [18 U.S.C. 3333(e)].

required proof that the district court had made the determination that was required to extend the special grand jury's term. 841 F.2d at 1309.[5]

d. On April 8, 1988, the district court—on the basis of the recent decision in *Taylor*—denied petitioners' motion to withdraw their guilty pleas and dismiss the indictment. The court concluded that

> [t]he statements made by the Seventh Circuit with regard to the facts that were before it in connection with Mr. Taylor's case are precisely the facts that would be before me in connection with the determination as to the codefendants [*i.e.*, petitioners]. I believe the grand jury was validly extended, and the indictment need not be dismissed on that basis.

Pet. App. 42.[6]

3. In the court of appeals, petitioners contended that the second superseding indictment was invalid because Judge McGarr's nunc pro tunc order "is not reliable evidence of [his] determination to extend

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[5] The court noted that "Judge McGarr's finding is corroborated by the fact that the 1984 Grand Jury voted in March to continue its work." 841 F.2d at 1309; see *id.* at 1303 n.8.

[6] The court also denied petitioners' request for an evidentiary hearing, "since all the pertinent facts really are clear in the record." Pet. App. 42.

Petitioners promptly appealed from the court's order and, in the alternative, sought a writ of mandamus. On April 25, 1988, the court of appeals denied petitioners' renewed motion for a writ of mandamus, citing its recent decision in *United States* v. *Taylor*, *supra*. Pet. App. 44. In May, the court of appeals also dismissed petitioners' interlocutory appeal as "premature." *Id.* at 45. Petitioners refiled their appeal after the imposition of sentence.

the grand jury." Pet. App. 3.[7] The court of appeals, however, rejected that contention and affirmed petitioners' convictions. Pet. App. 1-13. The court acknowledged that petitioners

> have submitted evidence, which [the district court] may have brushed aside too quickly, that the order is not reliable. The order was drafted by government lawyers and given to Judge McGarr to sign without notice to [petitioners] or to their lawyers. It is signed but of course not attested.

Ibid. Nonetheless, the court "assume[d] that our judges are not only honest but also not unduly suggestible, and therefore [concluded] that Judge McGarr would not have signed an order stating that he recalled extending the grand jury unless he accurately recalled having done so." *Id.* at 7. And the court pointed out that that order "was consistent with the fact that the grand jury had voted to extend its term." *Ibid.* The court therefore determined that it was unnecessary to "remand for a further hearing at which Judge McGarr would be placed under oath, examined, and cross-examined—with results entirely predictable." *Ibid.*

Petitioners also contended that the district court should have suppressed "evidence obtained by the FBI's recording of Daniels' telephone calls from jail." Pet. App. 12. The court of appeals rejected that argument, holding that the FBI agents had properly intercepted those calls under 18 U.S.C. 2510(5)(a)(ii), which allows wiretapping "by an

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[7] To the extent petitioners argued that Section 3331(a) requires a formal order to extend the term of the grand jury, the court of appeals declined to reconsider *United States* v. *Taylor*, *supra*. Pet. App. 2.

investigative or law enforcement officer in the ordinary course of his duties."[8] In the court's view, "[t]his describes what the FBI agents were doing when listening to Daniels conduct an illegal enterprise." Pet. App. 13.[9]

ARGUMENT

1. Petitioners contend (Pet. 11-17) that the court of appeals erred in considering "the ghostwritten statements * * * contained in Judge McGarr's order" as sufficient evidence that he had determined that the grand jury had not completed its investigation. Pet. 15. The court of appeals acknowledged the peculiar circumstances surrounding that order, *i.e.*, that "[t]he order was drafted by government lawyers and given to Judge McGarr to sign without notice to [petitioners] or to their lawyers." Pet. 3. Nonetheless, those facts did not undermine the court's conclusion that "Judge McGarr would not have signed an order stating that he recalled extending the grand jury unless he accurately recalled having done so." Pet. 7; cf. *Harris* v. *Rivera*, 454 U.S. 339, 347 (1981) ("well-established presumption that the judge adhered to basic rules of procedure"). Indeed, the court pointed out that Judge McGarr's recollection "was consistent with the fact that the grand jury had voted to extend its term." *Ibid.*; see *United*

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[8] In so holding, the court declined to decide "whether this is a case of consent by one of the parties to the phone conversation (namely Daniels) and is therefore within the exception in 18 U.S.C. 2511(2)(c)." Pet. App. 12.

[9] Petitioner Daniels also claimed that he had been coerced into pleading guilty. The court of appeals rejected that claim, Pet. App. 8-12, and Daniels has not sought further review of it.

States v. *Taylor*, 841 F.2d at 1303 n.8.[10] In these circumstances, contrary to petitioners' submission here, an evidentiary hearing was not required.

2. Petitioners also contend (Pet. 18-24) that Section 3331(a) requires a formal order—not simply "a judicial determination"—to extend the term of the grand jury. For the reasons stated in our brief in opposition in *Rosenstein* v. *United States*, 487 U.S. 1236 (1988) (see note 2, *supra*), the Seventh Circuit has adopted the most reasonable construction of Section 3331(a)—"that what operates to extend the term of a special grand jury is the district court's determination that the grand jury's work is not com-

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[10] Petitioners assert (Pet. 17) that the absence of a contemporaneous transcript of the March 1986 grand jury session in which Judge McGarr extended the term, see Pet. App. 52 ¶ 4, categorically refutes his recollection. To be sure, Fed. R. Crim. P. 6(e)(1) provides that "[a]ll proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device." But petitioners offer no sound reason for treating an apparent lapse in procedure (which otherwise "shall not affect the validity of the prosecution," Fed. R. Crim. P. 6(e)(1)) as tantamount to conclusive proof that the grand jury had not convened, particularly in the face of evidence to the contrary.

For that reason as well, petitioners mistakenly suggest (Pet. 16) that the court of appeals' decision conflicts with *United States* v. *Marr*, 856 F.2d 1471, 1472 (10th Cir. 1988).

In any event, it is not clear that petitioners would be entitled to the relief sought—dismissal of the second superseding indictment—even if Judge McGarr's recollection were mistaken. The "de facto officer" doctrine might well validate the actions of the Special October 1984 Grand Jury—an otherwise lawfully constituted and properly functioning grand jury, particularly since the convictions in this case were based on petitioners' guilty pleas. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 142-143 (1976); *Norton* v. *Shelby County*, 118 U.S. 425, 441-442 (1886).

pleted, rather than the ministerial act of formally memorializing that determination." U.S. Br. in Opp. 7-8; see *id.* at 8-12. Since the Court declined to review that issue two Terms ago, and since the issue has arisen in no other court and is unlikely to do so, further review of petitioners' contention is not warranted.

3. Finally, petitioners renew their claim (Pet. 24-30) that the district court should have suppressed evidence of Daniels' conversations intercepted over the prison telephones. Under 18 U.S.C. 2510(5)(a)(ii), federal authorities may intercept telephone communications without first obtaining judicial authorization if the intercepting device was "being used * * * by an investigative or law enforcement officer in the ordinary course of his duties." Here, in accord with Bureau of Prison regulations, see 28 C.F.R. 540.101,[11] officials at the MCC adhered to a policy of randomly monitoring inmate calls, and thus were alerted to petitioner Daniels' continuing criminal activities when they randomly monitored his calls. See Gov't C.A. Br. 37-38. Contrary to petitioners' assertion (Pet. 25-26), the Seventh Circuit and other courts have consistently held that such random monitoring falls within the "ordinary course of duties" exception in Section 2510(5)(a)(ii). *E.g.*, *United States* v. *Sababu*, 891 F.2d 1308, 1329 (7th Cir. 1989); *United States* v. *Feekes*, 879 F.2d 1562, 1565-1566 (7th Cir. 1989); see *United States* v. *Paul*, 614 F.2d 115, 116-117 (6th Cir. 1980).[12]

cert denied 464 U.S. 941

[11] That regulation provides for monitoring of inmate calls "to secure the security and orderly management of the institution and to protect the public." 28 C.F.R. 540.101.

[12] The statute, in that regard, is consistent with the Fourth Amendment. See *Lanza* v. *New York*, 370 U.S. 139, 142-143

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(1962); *United States* v. *Hearst*, 563 F.2d 1331, 1344-1346 (9th Cir. 1977). Cert denied, 435 U.S. 1000 (1978).

Petitioners err in claiming (Pet. 26) that the decision below conflicts with *Campiti* v. *Walonis*, 611 F.2d 387 (1st Cir. 1979). In that case, the law enforcement officer monitored one call for investigative purposes, not in accord with prison security procedures. The court held that under those circumstances the monitoring activity fell outside the statutory exception in Section 2510(5)(a)(ii). 611 F.2d at 392. Here, by contrast, the prison officials intercepted Daniels' calls under a random monitoring policy specifically designed to ensure prison safety.

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